IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
SECOND APPEAL NO.552 OF 1996

1. Vamanrao Sawalaram Bhosale,
aged 60 yrs. Occ : Agril.

2. Yadavrao Mahdavrao Bhosale,
aged 57 yrs., Occ: Agril.

3. Krishnarao Madhavrao Bhosale,
aged 49 yrs., Occ: Service.

4. Shevantabai Madhavrao Bhosale,
aged 75 yrs., Occ: Agril.

5. Gajarabai Dinkar Pawar,
aged 55 yrs., Occ: Agril.

6. Savitrabai Anandrao Jagtap,
aged 52 yrs., Occ: Agril.

All r/o. Jawale Tal. Khandala,
Dist. Satara. ..Appellants
(Org.Defts.)

Vs.

1. Vithal Tukaram Kadam,
aged 44 yrs., Occ: Agril.
r/o. Loni, Tal. Khandala,
Dist. Satara.

2. Chandrabhaga Bajirao Jagtap,
aged 49 yrs., Occ: Agril.,
r/o. Mahoor, Tal. Purandar,
Dist. Pune. ..Respondents
(Org. Plffs.)

Mr.G.N.Salunkhe i/b. Mr.P.A.Pol for appellants.
Mr.Machindra Patil for respondents.

CORAM: B.H.MARLAPALLE,J.

November 17, 2004.

ORAL JUDGMENT :

1. While admitting this Second Appeal by order

dated 3-2-1997 this Court has framed the following substantial question of law for decision:

> "Whether the Deed dated 21-4-1953 (Exhibit 62) is a Deed of Mortgage by way of conditional sale or a sale with condition of re-purchase?"

2. Regular Civil Suit No.26 of 1986 came to be filed by the present respondents for redemption of the mortgaged land viz. Gat No.817 admeasuring 14 gunthas, Gat No.837 admeasuring 16 gunthas, Gat No.830 admeasuring 19 gunthas, Gat No.874 admeasuring 27 gunthas, of village Jawle, Taluka Khandala in Satara District. It was claimed that Tukaram Bala Kadam, the late father of the plaintiffs had executed the deed of mortgage by conditional sale on 21-4-1953 in favour of Shri Madhavrao Savlaram Bhosale for consideration of Rs.700/- and it was agreed between the parties that on repayment of the said amount within ten years from the date of the deed, the purchaser would reconvey the suit land to the seller and such condition was embedded in another agreement signed on 2-5-1953. During the life time of Tukaram, he had approached Madhavrao for the return of land but in vain and in the mean while Madhavrao had

applied for effecting the mutation entries in his favour, which was opposed by Tukaram vide his representations at Exhibits 33 and 34. In the meanwhile the suit land was merged with the other holdings of Madhavrao's joint family and it was subjected to partition amongst the family members. Thereafter Madhavrao died sometime in the year 1972 and the plaintiffs had filed Regular Civil Suit No.89 of 1975 against the defendants for specific performance and during the pendency of this Suit Tukaram died. The plaintiffs were brought on record as LRs of Tukaram but subsequently the suit came to be withdrawn with condition to file fresh suit on the same cause of action. The suit land was subjected to consolidation under the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. RCS No.26 of 1986 thus came to be filed for redemption of the mortgaged agricultural lands. The trial Court on appreciation of the evidence held that the document at Exhibit 62 was a conditional mortgage deed and it was not an outright sale with the condition to repurchase. It further held that the bar of the provisions of the Consolidation Act did not come in the way of the plaintiffs and they were entitled for redemption of the land in Gat Nos.817,

837, 874 and 830. This decree dated 23-4-1990 passed by the Ld. Civil Judge Junior Division, Khandala came to be challenged by the present appellants-defendants in Regular Civil Appeal No.264 of 1990 which was dismissed by the learned 4th Additional District Judge, Satara vide his judgment and order dated 18-7-1995. The learned Additional District Judge agreed with the view taken by the trial Court that the Deed dated 21-4-1953 at Exhibit 62 was a mortgage by way of conditional sale and not sale with the condition of repurchase. On account of the order dated 5-12-1995 passed by this Court in Civil Application No.6738 of 1995 the appellants' possession over the suit land was protected and that is how they remained in possession of the said land continuously.

3. The official translation of the Deed dated 21-4-1953 at Exhibit 62 reads as under:

"Sale Deed for Rs.700 (Rupees Seven Hundred) in respect of the land situate at Jawle, Peta Khandala executed on Monday, 21-4-1953.

Madhavrao Savlaram Bhosale - age 41 (2) Wamanrao Savlaram Bhosale - age 28, Maratha, agriculturist, residing at Jawle, ... Party taking the Sale Deed in writing ... From

Tukaram Bala Kadam, Maratha, agriculturist, age 42 residing at Loni, Peta Khandala - Party giving the

Sale Deed in writing

Now in lieu of the agreed sum of Rs.700/- to be received in cash, to meet domestic expenses, before the Sub Registrar, Taluka Wai, I voluntarily sell to you the land which is purchased by me and which is of my ownership and which is Government jirayat and bagayat (Orchard) land situate at Jawle, Peta Khandala, Sub-Division and Taluka Wai, Division and District North Satara, together with a sheath (of grass), a narrow lane and a fallow portion of the land (the description of the said land is as follows)

C.S.No.	Area	Ass. Rs. Ps.	E	S	W	N
189/3	0-14	0-5	SD-2	SD-4	187	SD-2
190/6	0-17	1-7	SD-10	SD-7, 8,11	185	SD-5
190/9	0-4	0-6-6	Rivulet	SD-10	SD 2	SD-1
196/5	0-37	2-12	191		SD-6	201 to 5 SD-4,

together with the water from the dam of Kanheri rivulet by turn.

Thus the above described land together with appurtenances thereto and together with all the rights has been sold to you for the aforesaid sum of Rs.700/- (Seven hundred) and the possession thereof has been given to you on this day. Therefore, now, hereafter you shall go on carrying out the vahivat (management) of the said land by paying Government taxes, perpetually, from generation to generation in

the capacity of being owner, freely and as per your wish. Now, neither I nor my heirs and descendants have left any rights, claim, ownership thereto in any manner whatsoever. You have become an absolute owner of the said land. This property is free from any encumbrance. If anybody raises any objection then I shall ward off the same. Thus I give the sale-deed in writing. If I repay your amount of Rs.700/- (seven hundred) in any year (at any time) during the period of ten years from now then you have to return my said land to me, subject to this condition I have sold to you the said land.

Handwriting of Narayan Appaji Joshi residing at Wai.

Sd/-" (Emphasis supplied)

The recital of the Deed clearly shows that the suit land was sold to Madhavrao and his brother Vamanrao for a consideration of Rs.700/-. The possession of the suit land was also handed over to the buyers on the same day. The Deed clearly stated that the land was sold by ownership in perpetuity and the right of the transferor or his successors was declared to have

been waived off on the suit land. It was further stated that the ownership of the suit land passed on to the buyers without any encumbrance and any objection from the seller. Lastly it was stated that if at the end of any year during the period of ten years from the date of signing of the Deed, the seller repaid the amount of Rs.700/- to the buyers,

the land would be returned to the seller.

4. The learned Judge of the trial Court on perusal of this Deed dated 21-4-1953 recorded that it was a Mortgage Deed as the intention of Tukaram was to mortgage the suit land as a security for Rs.700/-. At the same time the trial Court noted that in the Deed it was clearly written that Madhavrao came in possession of the land as an absolute owner with all proprietary rights. The trial Court further noted that over all appearance of the document might be of sale but the intention of the parties was to transfer the land as a security for the loan and though the recitals of the document appear to be of sale, it was clear that for a particular period of ten years the property was given to Madhavrao as a security for the loan of Rs.700/-. This finding of the trial Court that the property was given as security for the loan

of Rs.700/- advanced by Madhavrao does not find place anywhere in the Deed and, therefore, the trial Court committed a manifest error in holding that the transaction fell within the ambit of Section 58(c) of the Transfer of Property Act, 1882. Section 54 of the said Act defines "Sale" to mean a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised and such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument. There is no dispute that the Deed at Exhibit 62 is a registered document. Section 58(a) and (c) of the Act being relevant for the present consideration, are reproduced as under:

> **"58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined -** (a) - A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.
>
> The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) ... ...

(c) **Mortgage by conditional sale -** Where, the mortgagor ostensibly sells the mortgaged property -

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale."

5. Both the Courts below concurrently held that the Deed at Exhibit 62 was a mortgage by conditional sale. The contents of the Deed nowhere mention that there was a relationship of debtor and creditor between the parties or that of lender and buyer. The first part of the Deed clearly stated that for the household requirements of Tukaram he needed money and, therefore, he decided to sell the suit land to Madhavrao and his brother. Both the Courts below have relied upon the so called separate agreement

dated 2-5-1953 (Exhibit 67). It requires to be noted that the said document is not an agreement and it is only the receipt of having received the possession of the suit land and its sale by Tukaram. It further stated that the land was sold by Tukaram to Madhavrao on 21-4-1953 and as agreed it would be returned to Tukaram on repayment of Rs.700/- within a period of ten years. To decide the nature of the Deed at Exhibit 62, it was not permissible for the Courts below to refer to this document at Exhibit 67 in view of the proviso below Section 58(c) of the T.P. Act i.e. "provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale." The document at Exhibit 62 had absolutely no recital to show that the interest in the suit land was being transferred for the purpose of securing the payment of money advanced or to be advanced by way of loan, existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. It was an outright sale with a condition that if Tukaram at the end of any year would return the amount of Rs.700/- within a period of ten years, the land would be returned to Tukaram by Madhavrao and his brother.

6. There is no dispute that the period of ten years expired in April 1963. On behalf of the plaintiffs one Mr.Sadashiv Ganpat Bhosale stepped in the witness box as PW 1 and in his capacity as a power of attorney holder of the plaintiff. While he was in the witness box he admitted that one of the plaintiffs was present in the Court and that he did not have any personal knowledge of the transaction completed by the Deed dated 21-4-1953. Mr.Salunke, the learned counsel for the appellants thus rightly relied upon the decision in the case of Janki Vashdeo Bhojwani v. Indusind Bank Ltd **[(2005) 2 SCC 217]** in support of his contentions that the testimony of this witness PW 1 was required to be discarded by the Courts below. The Supreme Court in the said case approved the view taken by the Rajasthan High Court to the effect that a general power of attorney holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of a party, he could appear in his own capacity. No one can delegate the power to appear in the witness box on behalf of himself and a general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the

plaintiff. Whatever knowledge the general power of attorney holder has about the case, he can state on oath but he cannot appear as a witness on behalf of the party in the capacity of that party. If the plaintiff is unable to appear in the Court, commission for recording of his evidence may be issued under the relevant provisions of the C.P.C.

7. The distinction between "mortgage by conditional sale" and "sale with condition of repurchase" has been dealt with in the case of Bhaskar Waman Joshi (deceased) and ors. v. Shrinarayan Rambilas Agarwal (deceased) and ors **[AIR 1960 SC 301]**. The present appellants had relied upon the decision of this Court in the case of Nana Tukaram Jaikar v. Sonabai and ors **[AIR 1982 SC 437]** as well as the decision of the Apex Court in the case of Tamboli Ramanlal Motilal (dead) by L.Rs. v. Ghanchi Chimanlal Keshavlal (dead) by L.Rs. **[AIR 1992 SC 1236]**. Both the Courts below fell in manifest errors in appreciating the law laid down by this Court in the case of Jaikar (Supra) and by the Supreme Court in the case of Tamboli Ramanlal (Supra). In paragraph 18 of its judgment in the case of Tamboli Ramanlal (Supra) the Supreme Court stated

thus:

> "18. The property is sold conditionally for a period of five years and possession is handed over. At the same time, the document proceeds to state "therefore, you and your heirs and legal representatives are hereafter entitled to use, enjoy and lease the said houses under the ownership right.
>
> It is this distinguishing point which has to be borne in mind because an argument was levelled that in Chunchun Jha's case, (AIR 1954 SC 345)(supra), also there was a clause transferring possession. But in this case the enjoyment by the transferee has to be under the ownership right. That makes all the difference." (Emphasis supplied)

The above observations are squarely applicable to the Deed at Exhibit 62 except that the period of conditional sale is of ten years instead of five years.

8. There was no evidence worth considering placed on record on behalf of the plaintiffs through any of their witnesses that Madhavrao was issued any notice or written approach letter with an offer to accept the amount of Rs.700/- and return the suit land during the period from 1953 to 1963. As noted earlier on the demise of Madhavrao sometimes in the year 1972 the suit land was subjected to partition amongst the LRs. of the buyers and the 7/12 extracts placed on record do indicate that in the year 1963-64

the mutation entries in respect of the suit land are in favour of the buyers. The objections recorded at Exhibits 33 and 34 by Tukaram in response to the notice received by him from the revenue authorities for recording the mutation entry in the name of Madhavrao and his brother, do not show any whisper that Tukaram made an offer of refund of Rs.700/- to Madhavrao and his brother and called upon them to return the land. By reading the document at Exhibit 62 it was clear that Tukaram or his LRs had the right to ask for return of land on offering the repayment of Rs.700/- only during the period from 1953 to 1963 and such a right could not have been sought to be exercised at any time. Civil Suit No.89 of 1975 was withdrawn by paying cost of Rs.212/- which was remitted on 4-12-1984 and the fresh suit filed i.e. RCS No.26 of 1986 could not have been entertained as the document at Exhibit 62 was the transaction of sale with a condition of repurchase and that too within a period of ten years and not at any time. The contents of this document are unambiguous and it did not vest any right in favour of the plaintiffs to seek the return of the land after the period of ten years from 21-4-1953.

9. It is well settled that the concurrent findings recorded by the Courts below, on facts cannot be disturbed in the Second appeal but in the instant case as per the substantial question of law framed by this Court, it was mainly the interpretation of the document at Exhibit 62, this Court was called upon to decide and the interpretation as made by both the Courts below is grossly erroneous and beyond the terms of the said document. The view of the Courts below that it was a mortgage by conditional sale is manifestly erroneous and, therefore, it is required to be quashed and set aside.

10. In the premises, the second appeal succeeds and the same is hereby allowed. The impugned orders passed by both the Courts below are hereby quashed and set aside. Resultantly Regular Civil Suit No.26 of 1986 is dismissed with costs.

(B.H.MARLAPALLE,J.)